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Criag J. Reece v. Board of Regents of the State of Utah : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Attorney General; Douglas C. Richards; Bill L. Walker; Assistant Attorneys General.

Craig J. Reece; Plaintiff-Appellant.

IN THE SUPREME COURT

OF THE STATE OF UTAH

CRAIG J. REECE, Plaintiff-Appellant, vs. BOARD OF REGENTS OF THE STATE OF UTAH, and the UNIVERSITY OF UTAH, Defendants-Respondents.	:	Case No. 19600

BRIEF OF THE PLAINTIFF-APPELLLANT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
THE HONORABLE JAMES S. SAWAYA, JUDGE

David L. Wilkinson
Attorney General
Douglas C. Richards
Bill L. Walker
Assistant Attorneys General
236 State Capitol
Salt Lake City, Utah 84114

Craig J. Reece
Plaintiff-Appellant
954 University Village
Salt Lake City, Utah 84108

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NATURE OF THE CASE

This is an action for restitution and declaratory judgment that the respondents violated Craig's rights to procedural due process with their policies and procedures for increasing rent at student family housing at the University. Also, the practices of using rent to finance new construction and capital improvements on a cash basis violates substantive due process and equal protection of the laws.

DISPOSITION OF THE CASE BELOW

Judge Sawaya, of the Third Judicial District Court, denied and struck the appellant's motions for partial summary judgment; and granted motions for summary judgment by each respondent.

RELIEF SOUGHT ON APPEAL

The appellant seeks an order reversing or vacating summary judgment for each respondent; an order granting each of the appellant's motions for partial summary judgment; a remand for trial on the issue of the amount of restitution to be paid to the appellant; and an order granting costs on appeal. In the alternative, appellant seeks reversal and remand for a trial on all issues, and his costs on appeal.

THE FACTS OF THE CASE

Craig Reece is a student at the University of Utah. He and his family have resided in the University Village, a part of Student Family Housing, since August 1, 1980 (R.2). The lease sets rent at $244.00 per month. The lease contains a rent escalator clause that allows rent to be increased if utility, operating, or maintenance costs increase (R.273). The rent has been summarily increased four times to the present rate of $302.00 per month (R.8). Utilities are estimated from a master meter for the entire Village rather than actual costs from individual meters on each apartment (R.273, 357).

The Village was constructed with funds from revenue bonds sold by the University and the Board of Regents between 1965 and 1979 (R.3). Other campus enterprises were also constructed with different bonds of the same series. All of these facilities comprise the Student Housing Bond System, which is the Village, Baliff Food Service, dormitories, Medical Plaza

housing for medical students, and the University Bookstore (R.3). This bond system is financially operated separately from the rest of the University.

By law, these facilities must collect sufficient revenue so that the income, together with land grant interest, will pay the bond debt without supplemental appropriations from the legislature. Utah Code Ann. § 53-38-3(7) (1953 as amended). The policy of the Board of Regents requires the Village to also be self-supporting as to operating and maintenance costs (R.279). The exact definition of this policy was a matter of dispute in the trial court (R.313-14).

Craig Reece filed suit seeking declaratory relief and a refund of rent because the policies, practices, and procedures of the respondents in increasing and spending rent are unconstitutional. He also challenged the construction of a second maintenance building--the Village already has one--with surplus rent (R.5). The other issues raised in the complaint are supplementary and will not be expressly addressed on appeal.

Craig moved for partial summary judgment on the legality of the maintenance building (R.25). The respondents did not answer the motion and failed to appear at the hearing.[1] The

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[1]Counsel for respondents had unsuccessfully attempted to reschedule the hearing, as explained in the affidavits (R.105, 100, 103). In retaliation for Craig's appearance at the hearing, they fabricated a story that Craig had lied to the judge (R.96) and filed a motion to have him held in contempt (R.95). They do not know what was said because they were not present. The motion for contempt was withdrawn without argument at the August 8, 1983, hearing.

trial court granted the motion (R.94), but did not sign an order to that effect (R.111). The motion for partial summary judgment was rescheduled by the respondents for August 8, 1983, nearly two months after the motion was filed (R.286, 294).

On July 20, 1983, the Board of Regents filed a motion to dismiss (R.112), and the University filed a motion for summary judgment (R.114) on July 21. On August 2, Craig filed requests for admissions and requests for the production of documents from each respondent (R.297-307). He also filed an affidavit and motion for continuance pursuant to Utah R. Civ. P. 56(f). (R.308, 316, 318).

After oral argument on the motions, the judge mailed a minute entry granting both of the respondents' motions and denying Craig's motion for partial summary judgment. (R.329). However, no judgment was entered because the respondents did not prepare one as required by Rule 2.9(a) of the Rules of Practice in the District and Circuit Courts of the State of Utah. Forty-five days after the requests for admission were filed, Craig filed a motion for partial summary judgment on all issues except the amount of restitution, a motion to compel the production of documents, additional affidavits, and the admissions of the respondents (R.334-61). At the hearing on this motion, the court refused to hear any argument (R.387-88). Judgment was finally entered on October 7, 1983 (R.368).

ARGUMENT

POINT I

THE MATTERS IN THE REQUESTS FOR ADMISSIONS ARE DEEMED ADMITTED FOR FAILURE TO RESPOND.

The disposition of the unanswered requests for admission is important to the factual base of the issues on appeal. The matters in a request for admission are "admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection. . . ." Utah R. Civ. P. 36(a). The court did not extend the time for answering,[2] nor did the respondents file an answer or objection for the sixty-two days between the filing of the requests and the hearing on the second motion for partial summary judgment.

The respondents must either treat the facts in the requests as immaterial, in which case they may not complain about their admissions, or they must concede that it was error to grant summary judgment while the requests were unanswered. Any doubt about the existence of a material issue of fact must be resolved in favor of the party opposing a motion for summary judgment. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

Requests for admission may be filed at any time, even after

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[2]The respondents orally requested an extension of time at the August 8 hearing, but the request was denied by the judge.

the hearing on a motion for summary judgment. Pittsburg Hotels Ass'n v. Urban Redev. Auth., 29 F.R.D. 512 (W.D. Pa. 1962). The time to answer the admissions is not suspended by the pendency of a motion for summary judgment. Schmitt v. Billings, 600 P.2d 516 (Utah 1979). The issue here is whether a minute entry granting summary judgment terminates discovery when no judgment is entered.

A minute entry is not a judgment and does not terminate the proceedings in the trial court. Wilson v. Manning, 645 P.2d 655 (Utah 1982). It is merely a memorandum from which the judgment is to be entered; it does not preclude further proceedings. Hartford Acc. & Indem. Co. v. Clegg, 103 Utah 414, 135 P.2d 919 (1943); Yusky v. Chief Consol. Mining Co., 65 Utah 269, 236 P. 452 (1925); Robison v. Fillmore Commercial & Sav. Bank, 61 Utah 398, 213 P. 790 (1923).

Rule 2.9(a) of the R. Prac. Dist. & Cir. Courts recognizes the interlocutory nature of minute rulings. The prevailing party has a maximum of fifteen days to prepare a judgment.[3] Compliance with Rule 2.9 is a prerequisite to the entry of a final judgment. Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980).

Any prejudice to the respondents is due to their inexcusable neglect. If the respondents did not want the matters admitted, they should have objected to the requests or moved to set the admissions aside under Utah R. Civ. P. 36(b). The entry of judgment also would have prevented the admissions,

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[3]Rules 2.9(a) and (b) are quoted in full at app. A-3.

but counsel for respondents made an error of law in thinking he did not need a judgment (R.362). The respondents simply failed to make any effort to exclude or prevent the admissions, even after they knew of Craig's reliance on the admissions. Since summary judgment should not be entered while discovery requests are unanswered, the respondents should not profit from an error of law compounded by their inexcusable neglect. Schmitt v. Billings, 600 P.2d at 519.

POINT II

THE BOARD OF REGENTS DID NOT AND COULD NOT DELEGATE THE DUTY TO SET RENT.

A. The Board of Regents did not delegate the power to set rent to the University. The sole basis of the Board's motion to dismiss was that the power to fix rent had been delegated to the University. Whatever authority the University once had to set rent was taken away and given to the Board of Regents by the legislature. Utah Code Ann. § 53-48-16 (1953 as amended).[4] Only the Board may act "on behalf of" the University to "equip, furnish, maintain, and operate such projects and buildings. For the use and availability of the foregoing, the board may impose and collect rents, fees, and charges from students. . . ." Section 53-38-1(4). See also, § 53-38-3(7) (the board, may fix rent to pledge to the bond). The events litigated in this suit show the wisdom of the statutory system of checks and balances.

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[4]Quoted in full at app. A-2.

In accordance with these directives, the Board used to set rent. This longstanding practice was changed when the Board "delegated" these duties to the University in May, 1980 (R.278). The source for this belief is the following excerpt from the minutes:

> President Gardner [of the University of Utah] suggested that Board policy be modified to require Board review and approval of housing and food charges only in the event that student housing is not self-supporting from user charges. Regent Newey offered a motion to request the Commissioner to draft an amendment to the Board's auxiliary policy to incorporate President Gardner's recommendation. He emphasized that those institutions that are using other options as provided in the housing addendum adopted by the Board today should continue to submit their proposed housing and food charges to the Board to be subject to its approval. Regent Brockbank seconded and the motion was unanimously adopted.

(R.279). The only directive here is for the Commissioner to draft the proposed rule. The board did not produce the requested final draft of the proposed rule (R.304).

The Institutional Council has only those powers over Board responsibilities that are "specifically authorized and delegated to the council by the board of regents. . . ." Utah Code Ann. § 53-48-19(2). To delegate is to appoint and direct someone to act as the agent of the delegator. The Board simply decided to withhold approval, it did not direct or empower the institutional council to do anything.

A delegation of authority is the making of a "rule" because it is a "statement of general applicability . . . that implements . . . the law or prescribes the policy of the agency

in the administration of its functions. . . ." Utah Code Ann. § 63-46-3(4) (1953 as amended). To make such a rule, the Board must post a public notice for five days prior to the meeting, § 63-46-12(2). This notice must include a statement of the terms or substance of the proposed rule and the reasons for its adoption, § 63-46-5(1)(a) (1953 & Supp. 1983). Then, interested persons must be permitted to offer comments on the proposed rule, § 63-46-12(1). The board refused to produce the minutes and agendas that would establish noncompliance with these requirements (R.305).

To assert that the board intended the minutes and resolution to be a final rulemaking is to impute an intent to evade the clear notice and comment requirements of the law. A rule is void if inadequate public notice is given. D.C. Transit System, Inc. v. United States, 717 F.2d 1438 (D.C. Cir. 1983). Rules are also void if not written and promulgated according to statute. Patterson v. Alpine City, 663 P.2d 95 (Utah 1983).

An agency action is also void if there is no justification for it in the administrative record. The court will not supply a reasoned basis for the action that the agency has not given. Mountain States Legal Found. v. Utah Pub. Serv. Comm'n, 636 P.2d 1047, 1058 (Utah 1981). This is especially important where, as here, the agency reverses its prior position.

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by [the legislature]. There is, then, at

> least a presumption that those policies will be carried out best if the settled rule is adhered to." Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856, 2866 (1983). Post-hoc rationalizations by appellate counsel are unacceptable. Id. at 2870. The intended delegation never occurred because no such rule was properly promulgated.

B. The Board cannot delegate the power to set rent. Counsel for the Board suggested that the power to set rent is optional because § 53-38-1(4) says the board "may" set rent (R.280). The Board's longstanding practice of actually setting rent belies this interpretation. There is no statute saying the University may set rent. The University has only those powers expressly granted by the legislature. First Equity Corp. v. Utah State Univ., 544 P.2d 887 (Utah 1975). The power to charge fees must be given in "clear, express, and unmistakable terms." Intermountain Health Care v. Industrial Comm'n, 657 P.2d 1289, 1291 (Utah 1982). The board cannot create the power to charge fees in the University by its rules. See Utah Mfrs. Ass'n v. Stewart, 82 Utah 198, 215, 23 P.2d 229, 236 (1933) (fees must be expressly provided by statute).

The word "may" is mandatory if it is the only reasonable interpretation of the statute. Harding v. Alpine City, 656 P.2d 985 (Utah 1982). "May" is also mandatory if third parties

are prejudiced by administrative inaction. Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1033-35 (Utah 1983). It is unlikely that the legislature intended to allow the Board to undo the Higher Education Act by redelegating back all of the powers the legislature took away.

An agency may not completely delegate decisionmaking authority that requires the exercise of discretion and informed judgment. State Tax Comm'n v. Katsis, 90 Utah 406, 62 P.2d 120, 122-23 (1936). It may only delegate ministerial duties, such as factfinding duties, and other nondiscretionary functions. Id.; Anderson v. Grand River Dam Auth., 446 P.2d 814, 818 (Okla. 1968).

The interpretation and application of lease provisions to determine whether the conditions precedent to a rent increase have been satisfied, and what the new rent should be, are judicial functions requiring the exercise of discretion. Anderson v. Section 11, Inc., 626 P.2d 1027, 1028 (Wash. Ct. App. 1981); Estwin Corp. v. Prescription Ctr. Pharmacy, Inc., 563 P.2d 78 (Nev. 1977). See Annot., 87 A.L.R.3d 986 (1978) (judicial interpretations of rent escalator clauses). It should not be a legislative act, as is utility ratemaking, because the contract clause in the constitution forbids a state from legislatively altering its own obligations under a contract. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

If this attempted abdication of responsibility is legal, then what would stop the Public Service Commission from

delegating all of its utility ratemaking duties to its staff? These agencies must respect the checks and balances established by statute. That the Board merely wanted to divest itself of statutory duties is shown by the absence of any oversight of the Village (R.360-61). For these reasons, the rent increases are void because they were not approved by the Board of Regents.

POINT III

THE PROCEDURES USED BY THE UNIVERSITY TO INCREASE RENT VIOLATE DUE PROCESS.

The University violated due process[5] by giving inadequate notice and hearing opportunities to Craig before it increased rent. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law." Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955). A due process analysis requires a two-step inquiry. First, a property interest must exist, then inquiry is made into what procedures are required to protect that interest. State ex rel. Summers v. Wulffenstein, 616 P.2d 608, 610 (Utah 1980).

A. Craig has a property interest in the amount of rent charged by the University. The lease sets rent at $244.00 per month, with provision for increases if certain conditions are satisfied (R.273). Due process protects against erroneous rent increases that exceed the restraints in the lease. Aguiar v. Hawaii Hous. Auth., 522 P.2d 1255, 1267 (Hawaii 1974); Riger v.

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[5]U.S. Const. amend. XIV, § 1; Utah Const. art I, § 7.

L & B Ltd. Partnership, 363 A.2d 481, 487 (Md. 1976). The terms of the lease create the expectation that rent will be increased only if certain costs increase. Expectations created by express or implied contract that fix the duties of the respective parties are property interests protected by due process. Perry v. Sindermann, 408 U.S. 593, 602 (1972). See Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 647 P.2d 1293, 1297-98 (Utah 1982) (protecting legitimate expectations not based on express contract).

The existence of a utility cost increase is one condition precedent to a rent increase. "The utility portion of rent . . . may be increased from time to time due to increased consumption or higher utility rates charged by suppliers. . . ." (R.273). The other condition precedent is an increase in debt service, maintenance or operating costs. This condition is from the implied incorporation[6] of § 53-38-6 into the lease:

> [A]ll income and revenues derived from the operation of the building shall . . . be applied solely to the payment of principal and interest on the bonds, and . . . to the payment of the cost of maintaining and operating the building. . . .

The determination whether these costs have increased, and by how much, is the kind of factual decision requiring a due process hearing before a rent increase. Thompson v.

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[6]Controlling statutes are impliedly incorporated into leases. Hall v. Warren, 632 P.2d 848 (Utah 1981). Section 53-38-6 is reprinted infra, at app. A-2.

Washington, 497 F.2d 626, 638 n.43 (D.C. Cir. 1973); Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2nd Cir. 1971).[7] "Notice and hearing to individuals are fundamental rights when government makes factual individual determinations which may affect a person's fundamental interests." Concerned Parents v. Mitchell, 645 P.2d 629, 636 (Utah 1982). Rent increases for existing leases is an adjustment of contract rights that is traditionally adjudicated by courts. E.g., Anderson v. Section 11, Inc., 626 P.2d 1027 (Wash. Ct. App. 1981); Estwin Corp. v. Prescription Ctr. Pharmacy, Inc., 563 P.2d 78 (Nev. 1977).

A rent escalation clause that contains no provision with which to calculate the new rent with definiteness is unenforceable for being too vague. Pingree v. Continental Group, 558 P.2d 1317, 1321 (Utah 1976). The respondents must therefore concede that there is a formula for fixing the new rent, thus conceding a protectable property interest; or they must claim there are no guidelines, which will void the rent increases for indefiniteness. Id.

A separate but complimentary property interest is the benefit of living in low cost housing. When the government owns and operates a housing project for the purpose of providing low cost housing, the tenants have a property interest in keeping the rent low. Thompson v. Washington, 497

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[7]The Langevin court found no due process right because there was insufficient government involvement to invoke the constitution. The same circuit later held that when the housing is owned by government, notice and hearing are required before rent increases. Burr v. New Rochelle Mun. Hous. Auth., 479 F.2d 1165 (2nd Cir. 1973).

F.2d at 633, 638, 643; Aguiar v. Hawaii Hous. Auth., 522 P.2d at 1267; Burr v. New Rochelle Mun. Hous. Auth., 479 F.2d 1165 (2nd Cir. 1973). The same is true for federally subsidized housing, where the tenant is entitled to notice and an opportunity to comment before federal authorities approve rent increases. Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483 (9th Cir. 1974); Note, "Procedural Due Process in Government-Subsidized Housing," 86 Harv. L. Rev. 880 (1973). Contra: Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970) (no property interest because federal housing law was intended to induce private investment in housing). Federeal regulations now require notice and comment opportunities to tenants in subsidized housing. 24 C.F.R. Part 401 (1983).

The Village is intended to provide low cost housing as an inducement to students to attend the University, and as an adjunct to the state student financial aids program (R.297). Craig relied on the expectation of low cost housing as a substantial factor influencing his decision to attend the University of Utah (R.317). The operation of government institutions so as to create bona fide expectations and reliance creates a property interest protected by due process. Perry v. Sindermann, 408 U.S. 593, 600-01 (1972).

Evidence abounds that the legislature expects the Village to provide low cost housing. "The very premise of the program is that the rents will be substantially lower than those obtainable in the private market; otherwise public housing would not be necessary." Thompson v. Washington, 497 F.2d at

633. There are strict limits on the items rent can be spent on. Utah Code Ann. § 53-38-6. The Village is not to operate for profit (R.356, 361).[8] The property and operations of the Village are exempt from taxation. Utah Code Ann. § 53-48-18. The Village was constructed with low interest government bonds, a substantial cost savings. These "mortgage" payments are further reduced by receipt of $473,239 in state land grant interest in 1982 alone (R.259); and an annual federal bond interest subsidy of $258,952 (R.253).

Basic maintenance and operating costs per unit should theoretically be about the same for similar government and private apartments. Thus, the only time rent for government housing should even be close to private housing is when the economic benefits of government ownership have been squandered through profligacy. For example, it is inconceivable that a private landlord could make a profit with an $800,000 annual payroll (R.253). The legislature did not provide a student loan program[9] to finance government waste through private debt (R.14-15). The lack of oversight by the Board of Regents protects and allows uncontrolled administrative expenditures (R.360-61, 357-59). Craig has a property interest in rent to prevent this kind of abuse of his legitimate expectations of

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[8]Public housing owned by cities and counties also may not be operated for profit or revenue; and rent may be no higher than necessary to meet specified expenses. Utah Code Ann. § 55-18-10 (Supp. 1983).

[9]Utah Code Ann. §§ 53-47-1 and -2; 53-47a-1 to -8; 53-47b-1 to -14 (1953 as amended).

low cost housing and prevent the unilateral alteration of his lease.

B. The procedures used to increase rent do not afford due process. The procedures required by due process are a matter of federal constitutional law, otherwise the state could use procedural limitations to virtually destroy state-created rights. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). See Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293 (Utah 1982) (applying this principle to liquor license revocations). The rent increase notification procedures in the lease (R.273) are not controlling, nor are they substitutes for due process. Aguiar v. Hawaii Hous. Auth., 522 P.2d at 1268; Escalera v. New York City Hous. Auth., 425 F.2d 853, 864 (2nd Cir.), cert. denied, 400 U.S. 853 (1970).

The first prerequisite of due process is the availability of a hearing before a citizens' property rights are affected. Notice serves no purpose if there is no provision for hearing and evaluating comments. "There must be a full and public hearing. There must be evidence sufficient to support the necessary findings of fact." McGrew v. Industrial Comm'n, 96 Utah 203, 223, 85 P.2d 608, 617 (1938); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 302-04 (1937). Greater formality and procedural regularity are required when a university makes determinations of a student's nonacademic rights. Board of Curators v. Horowitz, 435 U.S. 78, 89 (1978).

The rent approval proceedings before the Institutional Council is not a hearing. There is no presentation or

evaluation of evidence, not even from the University. The reasonableness of the existing rent and the necessity of an increase[10] are neither determined nor discussed (R.358). A list of rental charges prepared by unknown university employees is perfunctorily rubber-stamped without public discussion (R.266-67). A public meeting where no evidence is taken and the administrative body merely accedes to the decision of its staff is not the hearing required by due process. McGrew v. Industrial Comm'n, 96 Utah at 224-25, 85 P.2d at 616-18.

> For these agencies, which necessarily multiply in our complex society, to serve the purposes for which they are created and endowed with such vast power, they must accredit themselves by acting in harmony with the inbred concepts of fair play and the cherished traditions of a cautious, deliberate and judicious determination of the questions affecting people's rights or liberties.

Id., 96 Utah at 225, 85 P.2d at 618.

Due process also requires the allowance of adequate time to prepare to meet the claims of the University. Nelson v. Jacobsen, 669 P.2d 1207, 1214 (Utah 1983). The University did not produce the requested copies of three of the notices for the challenged rent increases (R.302). The fourth notice was given on April 29, 1983 (R.269), a mere ten days before the May 9 meeting where rent was increased (R.266). No amount of time is enough when the University has a policy of refusing to

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[10]In nonconstitutional utility rate increase hearings, an increase cannot be granted without evidence. Utah Dept. of Bus. Reg. v. Public Serv. Comm'n, 614 P.2d 1242 (Utah 1980). A rate increase cannot be based on old data to support the existing rate. Utah State Bd. of Regents v. Utah Pub. Serv. Comm'n, 583 P.2d 609, 611 (Utah 1978).

release the financial records on which the increase is based (R.354).[11] Of course, the notice and hearing must precede the rent increase. Aguiar v. Hawaii Hous. Auth., 522 P.2d at 1267. See, Burtnieks v. City of New York, 716 F.2d 982 (2nd Cir. 1983) (predeprivation hearing required when deprivation is pursuant to state policy).

The notice given must inform the student that he faces a final deprivation of property as a result of the hearing described in the notice. Nelson v. Jacobsen, 669 P.2d at 1213. Craig had no reason to believe the action of the Institutional Council was final, assuming he knew about it, because the former director of Student Family Housing had told him the Board of Regents must approve rent increases before they take effect (R.316). An article to the same effect was published in the student newspaper; The Daily Utah Chronicle, May 11, 1983, at 1, 3. The extent of Craig's confusion was shown by the allegations of the Complaint that the board must approve rent increases (R.9). The lack of notice that the University's action was final violates due process.

The notices were also fatally defective because they did not inform Craig of any alleged opportunity to comment on rent increases to any person or in any forum (R.317, 354-55). By all appearances and terminology, the notices were final and there was no information about a chance to comment (R.269, 316-17, 356). This does not satisfy due process, even if other

[11]Counsel for respondents correctly noted that these documents are public records that must be made available for copying (R.332).

persons knew of the alleged opportunity to comment. Worrall v. Ogden City Fire Dept., 616 P.2d 598 (Utah 1980); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-16 (1978).

Craig's interest in proper procedures is substantial. Skyrocketing rent threatens his financial ability to remain in school and increases his student loan debt (R.14-15). If he challenges a rent increase without paying, he not only faces eviction, but the University will hold his registration and academic transcript (R.273). There is no choice but to pay or be expelled. The transcript hold prevents transfer to another university, graduation, and entry into his chosen profession. Strict compliance with due process is required when property interests are affected that threaten the student's financial ability to continue in college. Devine v. Cleland, 616 F.2d 1080, 1087 (9th Cir. 1980).

The additional cost to the respondents to provide more procedure would not be great. The University should already be compiling cost analyses and making a presentation to justify rent increases, although it is not presently doing this. Thus, the University will not have to do much more than is already expected for normal administrative decisionmaking. The difference will be that the Board of Regents will now have to look at both sides instead of none. But the board's staff can be used to reduce this load by initially analyzing the comments and data. Every agency, city, and county in the state must provide public hearings, so the respondents should not seek special treatment. Administrative inconvenience is no excuse

for ignoring the fundamental right to due process. Ohio Bell Telephone Co. v. Public Utils. Comm'n, 301 U.S. at 304-05.

Due process is a flexible concept. It does not require separate oral hearings for each affected student. The exact format of the hearing process may need to be developed over time. The constitutional minimum was expressed in Burr v. New Rochelle Mun. Hous. Auth., 479 F.2d at 1170:

> Notice of a proposed increase in rent shall be served well in advance of the date for the increase. Opportunity for filing written objections shall be given. There need be no opportunity for oral presentation. The tenants or their representatives shall have the right to submit any material they consider relevant to disprove the need for the rent increase. Finally, the Review Board upon reaching a decision shall issue a statement outlining the reasons for either approving [,modifying,] or rejecting the requested rent increase. The tenants may of course be represented by counsel.

The due process clause and the contract clause in the constitution require that a state act only out of necessity and with utmost fairness when changing material terms in a contract. Procedural regularity is indispensable to safeguard the citizen and the sanctity of contract. "It is procedure that spells much of the difference between rule by law and rule by whim or caprice." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

POINT IV

THE USE OF RENT TO SUPPORT THE UNIVERSITY AND MAKE CAPITAL IMPROVEMENTS VIOLATES SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION.

The taking of private property for public use without just

compensation[12] and the levy of illegal and discriminatory taxes on students are prohibited regardless of the procedures used. The respondents have built certain charges into the rent that are not to cover unique expenses of the Village, but are designed to provide revenue for the University. "[A] reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not." Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982). Reasonableness is not ordinarily determined by summary judgment. Id. However, the charges at issue here are so inherently inequitable that they are unreasonable per se. Id. In addition, the charges are not for specific services but for general governmental duties.

Although Craig was not allowed any discovery, he was able to identify the following payments: (1) using rent to subsidize other facilities in the Student Housing Bond System (R.12, ¶¶ 37, 38); (2) using rent to finance a second maintenance facility at the Village (R.359); (3) surplus utilities charges are given to the University (R.358); (4) interest earned from rent deposited in the bank is taken by the University (R.351); (5) direct charges for University administrative expenses (R.8, 11-12, 22); (6) surplus rent not spent on capital improvements is given to the University (R.354).

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[12]"Private property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22.

A. These forfeitures and fees are unconstsitutional takings for general government revenues. The University's powers to use funds in its care are strictly limited by statute. First Equity Corp. v. Utah State Univ., 544 P.2d 887 (Utah 1975); University of Utah v. Bd. of Examiners, 4 Utah 2d 408, 439-40, 295 P.2d 348, 369-70 (1956). As state agencies, the respondents have no power to tax anybody to raise revenue. Western Leather & Finding Co. v. State Tax Comm'n, 87 Utah 227, 231-32, 48 P.2d 526, 528 (1935). Accordingly, the Village is not to be operated for profit or as a revenue source (R.356, 361).

The power to charge rent must be narrowly construed to extend only to payment for the cost of benefits not shared by other members of society. National Cable Tel. Ass'n v. United States, 415 U.S. 336, 340-41 (1974). A broad interpretation creates constitutional problems as a delegation of taxing power. Id. at 342-43. Without legal limits--imposed by statute or constitution--rent could be used to evade budgetary restrictions and accountability for expenditures.[13] A strict construction of the rent power is compelled by § 53-38-6, which requires rent to be "applied solely to the payment of principal and of interest on the bonds, and . . . to the payment of the cost of maintaining and operating the building." (Emphasis added.) An agency cannot use its rules to create fees that are

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[13]As to the complete lack of accountability under the present system, see R.357, ¶ 13; 358-61.

not established by statute. Utah Mfrs. Ass'n v. Stewart, 82 Utah 198, 215, 23 P.2d 229, 236 (1933).

Certain factors for a void fee may be gleaned from the cases. The fee must have some relationship to the need for services created by the activities of the payor. Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979). It must pay for a specific benefit provided to the payor that is "not shared by other members of society." National Cable Television Ass'n, 415 U.S. at 341; Cache County v. Jensen, 21 Utah 207, 227, 61 P. 303, 308 (1900). The recipient of a unit of service must be identifiable apart from the general public. FPC v. New England Power Co., 415 U.S. 345, 350-51 (1974). All citizens who share in the benfit of the service must pay their fair share of the cost. Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982). If these factors are minimal or merely incidental, and the money is used primarily as revenue for general university purposes, it is a "tax" regardless of the actual label used to describe it. Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 217, 487 P.2d 866, 867 (1971).

The automatic forfeiture of unspent rent and utilities payments to the University at the end of each fiscal year is obviously not a charge for a service. This windfall to the University is prohibited because the Village cannot be a revenue source. This policy is the motivation for many unnecessary expenditures by the Village (R.354, ¶ 6), which must be stopped if the Village is ever going to be run in an economical manner to provide low cost housing. For the same

reasons, there is no legal justification for the Village to subsidize revenue shortfalls for other campus enterprises.

The University also makes a direct charge for police, fire, public relations, personnel services and other administrative activities of the University (R.8, 11-12 (allegations admitted in Answer, 22)). This charge is in addition to the administrative costs of the Village, which are a part of the Village operating budget (R.253). These University-wide services are already paid for from taxes and general student fees other than rent (R.8, 12 ¶ 35, 22).

Salt Lake City is already obligated to provide police and fire protection to all residents of the city, so the Village is not receiving a special benefit that is otherwise unavailable to the public. Utah Code Ann. §§ 11-7-1; 10-6-61 (1953 as amended). These services are the inherent sovereign duties of government, not a special service uniquely required by the Village. Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 789 (Utah 1977). The legislature has not authorized the imposition of fees on students to pay for essential governmental services already paid for from other sources, so these fees are void.

Rent is collected to pay bond debt, utility, maintenance, and operating costs of the Village. "If money is collected from the public for a specified purpose, it becomes a trust fund committed to the carrying out of that purpose." Call v. City of West Jordan, 606 P.2d at 200. Once the trust purpose is fulfilled for each fiscal year, the surplus should be

refunded under the principles of constructive trust. It cannot be used as general revenue. Id. In Bishop v. J.E. Crofts & Sons., 545 P.2d 520 (Utah 1976), surplus insurance premiums and dividends earned by a nonprofit corporation that purchased insurance for its members was refunded under constructive trust. In Hansen v. Kohler, 550 P.2d 186 (Utah 1976), rents and profits earned by a real estate agent before the sale of property were held in constructive trust for the seller.

A constructive trust is imposed on money paid to another for a specified purpose in order to prevent fraud and unjust enrichment. Haws v. Jensen, 116 Utah 212, 209 P.2d 229 (1949). It is unjust enrichment for the University to keep the surplus because the Village is not supposed to be a revenue source. Cf. Bishop v. J.E. Crofts & Sons, where a nonprofit corporation was a constructive trustee. In Texas Eastern Trans'n Corp. v. FPC, 414 F.2d 344 (5th Cir. 1969), cert. denied, 398 U.S. 928 (1970), a gas company was required to refund excess revenue to consumers because utilities regulation was intended to provide low cost gas, and a refund would further that purpose. It is also fraudulent for the University to use coercive state power--the threat of expulsion from college and eviction--to collect excessive rent for phantom expenses when it intends to keep the economic benefit of the surplus.

Because rent is a trust fund, so is the interest earned on rent deposited in the bank. Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1036 (Utah 1983) (interest on taxes

collected for school districts). All of the profit a trustee earns on the trust funds must be paid over with the refund, or at least used for trust purposes. Bishop v. J.E. Crofts & Sons, 545 P.2d at 524.

B. The use of rent for capital improvements and new construction is an illegal tax. Craig is not obligated under the lease to pay for capital improvements to University property. In 1982, the Village spent at least $550,070 for such capital improvements as new asphalt and concrete, roof replacements, peripheral lighting, and secondary electrical upgrade (R.260).[14] It also spent $366,000 for construction of a new maintenance building. These expenses were paid from rent.

The term "maintenance" in § 53-38-6, as incorporated into the lease, has a definite meaning in landlord tenant law. It means "to keep in a particular state or condition, especially with reference to efficiency; to support, to sustain, to keep up; not to suffer to fail or decline." Mid-Continent Life Ins. Co. v. Henry's, Inc., 520 P.2d 1319, 1324-25 (Kan. 1974). This definition excludes major structural repairs that survive the term of the lease and are not necessary because of a special use of the premises by the tenant. Id. When structural repairs are necessary to comply with building codes, the landlord, not the tenant, must pay for the repair. Wolfe v.

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[14]The University owns the exterior electrical distribution system in the Village. In buying electricity from Utah Power & Light Co. for resale at the Village, it is operating as an unregulated electric utility (R.357).

White, 114 Utah 39, 197 P.2d 125 (1948) (roof replacement); Pingree v. Continental Group, 558 P.2d 1317 (Utah 1976) (fire escape).

If the landlord voluntarily undertakes improvements not required by law, he must still pay for them. Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 451 P.2d 721 (Cal. 1969). It is unjust enrichment to require tenants who happen to live in the Village in a given year to pay for capital improvements that primarily benefit the state's reversionary interest. See Annot., 22 A.L.R.3d 521, 543-48 (1968) (primary benefit to the landlord's reversionary interest is a major factor in deciding who pays for major repairs). In the lease at issue here, the University unambiguously assumed financial responsibility for all repairs and renovations (R.274). It is a breach of the lease to try to shift these costs to Craig.

Unlike cases involving sewer connection fees and similar fees for municipal improvements, the person who pays, the tenant, receives no benefits to his real property. So long as the University continues to make massive cash investments in capital improvements, there is no way to equitably spread the cost among present and future beneficiaries, as required by the lease and the constitution. Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

The legislature has provided a way to equitably finance new construction and capital improvements. These methods are appropriations, revenue bonds, contracts with the United

States, long term contracts and loans. Utah Code Ann. §§ 53-38-2 to -16 (1953 as amended). All of these methods spread the cost over the entire group of tenants who will supposedly benefit. Rather than use these methods, the University uses rent directly for cash payments, or it uses surplus cash in the bond account, as it did with the second maintenance building (R.220). Either way, the money comes from rent (R.359, 183-90).

The respondents do not have the power to use their rules to create new ways to finance capital improvements. The legislative listing of approved methods impliedly excludes the use of unlisted methods; just as the listing of authorized investments impliedly excluded unlisted investments in First Equity Corp. v. Utah State Univ., 544 P.2d at 892. General sections of the statutes are construed no more broadly than provisions that specifically treat the same subject. In re Disconnection of Certain Territory, 668 P.2d 544, 547-48 (Utah 1983). Thus, wherever the respondent's claim to derive authority to avoid statutory limitations on financing, it cannot be construed to extend to a subject already specifically covered.

C. The present procedures for approving capital improvements are unlawful. The Board of Regents is required to "approve or disapprove all new construction, repair, rehabilitation, or purchase of educational and general buildings and facilities financed from any source at all institutions subject to the jurisdiction of the board. . . ." Utah Code Ann. § 53-48-17

(1953 as amended) (reprinted in Appendix). The board did not approve the construction of the maintenance building, nor has it authorized any of the other capital improvements at the Village since it abdicated its duties in 1980 (R.361). These expenditures are void because the board is the only authority having power to construct or remodel buildings on behalf of the University. Utah Code Ann. §§ 53-38-1(1), 53-48-16 (1953 as amended) (reprinted in the Appendix).

The respondents claim that their rules allow rent to be used to finance new construction without prior approval by the Board of Regents (R.117-19). Contrary to the Board's rule, the law says that approval must be given regardless of the source of financing. "The rules adopted by an administrative agency are not binding on the courts and an 'administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight.'" West Jordan v. Morrison, 656 P.2d 445, 447 (Utah 1982) (quoting Utah Hotel Co. v. Industrial Comm'n, 107 Utah 24, 32, 151 P.2d 467, 471 (1944)). A clear and unambiguous statute is enforced as written.

With the maintenance building, the University also evaded restrictions on accepting bids exceeding the estimated cost of the project. Bids cannot be accepted if the lowest bid exceeds the cost estimate by more than 5%. Utah Code Ann. § 63-56-21(7) (Supp. 1983). "Competitive sealed bidding is unsuccessful when all bids . . . are unreasonable, noncompetitive, or the low bid exceeds available funds as

certified by the appropriate fiscal officer." Utah State Bldg. Bd. Regs. for the Procurement of Constr. and Prof. Serv., § VE(2) (1980). The lowest bid exceeded the estimated cost by $35,700, or 12.3% (R.93). This high bid was not approved by the Institutional Council until June 13, 1983 (R.244 (the date is in the far upper right-hand corner)); nearly one month after the contract was signed (R.86). The last rent increase was decided on the same day the University accepted the budget-busting bid (R.92, 269).

In summary, the University has been acting without restraint or authority in purchasing capital improvements and new construction with rent. These are not legitimate maintenance costs and are contrary to the lease. The state's reversionary interest benefits much more than a tenant's leasehold. The respondents must use approved financing methods to spread the cost equitably. Furthermore, the Village is being operated contrary to the respondents' own rules as a source of revenue for general University administrative expenses. These actions violate substantive due process and the rational basis level of equal protection analysis.

POINT V

THE TRIAL COURT ERRED IN STRIKING CRAIG'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT.

The trial court refused to hear argument on Craig's second motion for partial summary judgment because he felt that the earlier ruling had disposed of the case (R.384-89). Instead,

he sua sponte struck the motion (R.365).[15] The case was still pending because the prior minute entry had not been reduced to judgment. New evidence in the form of admissions and affidavits was submitted. A motion for summary judgment is nearly always relevant, so it should have been granted or denied, not stricken. If a motion for summary judgment presents the case in a different light because of new evidence or the like, a prior ruling may be reexamined if the case is still pending. Board of Educ. v. Salt Lake County, 659 P.2d at 1033.

POINT VI

THE TRIAL COURT ERRED IN DEPRIVING CRAIG AN OPPORTUNITY FOR DISCOVERY.

Craig filed an affidavit and motion for a continuance of the respondents' motions for summary judgment because they had not responded to his discovery requests and he had no evidence to challenge the supporting affidavits (R.317, 314, 325). The requests for admission and requests for the production of documents are specific and detailed in listing the needed evidence, which was in sole possession of the respondents. "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse

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[15]The respondents filed a motion to strike this motion on the day of the hearing (R.366). This motion could not have been granted, even if the judge knew about it, without at least five days notice. Utah R. Civ. P. 6(d).

the application for judgment. . . ." Utah R. Civ. P. 56(f).

The discovery requests were filed only ten days after Craig received the respondents' motions wherein, for the first time, he learned which points the respondents would contest. This, too, after the respondents had twice delayed a hearing on Craig's motion for two months just so they could file their motions for summary judgment. Where the party opposing a motion for summary judgment had no prior knowledge of facts presented by affidavit in support of the motion, and the movant has exclusive possession of necessary evidence, it is an abuse of discretion to refuse a continuance. Auerbach's v. Kimball, 572 P.2d 376, 377 (Utah 1977); Strand v. Associated Students of the Univ. of Utah, 561 P.2d 191 (Utah 1977).

Summary judgment is not a penalty for not conducting discovery on the timetable set by the opposing party. It is improper to consider the materials submitted in support of a motion for summary judgment when the opposing party has not had discovery to permit impeachment of the supporting affidavits. Miller v. Alexander, 25 Fed. R. Serv.2d 1040 (D.D.C. 1975).

Every inference that would indicate the existence of a material issue of fact should be given to the party opposing a motion for summary judgment. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982). It is impossible for the judge to have known the factual basis for Craig's claim and what the challenged policies, practices, and procedures are without discovery. The refusal to allow discovery until after a motion to dismiss is heard may cause unfair prejudice to the non-moving party.

Schmitt v. Billings, 600 P.2d 516, 519 (Utah 1979). It was therefore reversible error to grant summary judgment against Craig without an opportunity for discovery. In addition, the materials presented in support of the motion ignored argument on the constitutional issues (R.321, 312-14), and were inadequate to show that the respondents were entitled to judgment as a matter of law.

CONCLUSION

Rather than being ruled by law, the Village is ruled by fiat. Like the feudal lords of old, the rulers of the Village operate free of restraint or oversight. They do not feel constrained to follow the most direct commands of the legislature. They are more likely to change their contract than honor it (R.276 §§ 12(a), 15; 337-38). Such is the result when the lead agency abdicates all responsibility and frustrates a carefully designed system of checks and balances. This would always be the case were it not for the state and federal constitutions, wherein procedure is the protector of the disadvantaged.

Craig is entitled to judgment as a matter of law. The respondents' policies and procedures in setting and spending rent deny procedural and substantive due process. Craig is entitled to restitution of all rent that was unlawfully taken and spent. He is also entitled to the costs of this appeal and the cost of printing the brief. Utah R. Civ. P. 75(p)(5). As an action jointly brought under 42 U.S.C. § 1983 (1976) and the

state declaratory judgment statute, costs are awardable to the prevailing party. 42 U.S.C. § 1988 (Supp. V. 1981); Utah Code Ann. § 78-33-10 (1953 as amended). A remand is necessary to calculate the amount of restitution to be paid.

Respectfully submitted this 19th day of January, 1984.

Craig J. Reece

Craig J. Reece

CERTIFICATE OF SERVICE

I certify that on January 19, 1984, I hand-delivered four copies of this brief to Douglas C. Richards and Bill L. Walker, Assistant Attorneys General, 236 State Capitol, Salt Lake City, Utah.

Craig J. Reece

APPENDIX

All references to Utah Code Ann. (1981).

53-38-1. Powers of state board--Projects and buildings. The state board of higher education on behalf of the University of Utah, the College of Eastern Utah, Utah State University of Agriculture and Applied Science, Snow College, Weber State College, Southern Utah State College, Dixie College, and the Utah Technical Colleges at Salt Lake and Provo (all being state institutions of higher learning) is authorized and empowered on behalf of such institutions:

(1) To acquire, purchase, construct, improve, remodel, add to, and extend self-liquidating projects, revenue-producing buildings, and all other projects and facilities including, but not limited to: classrooms and other instructional facilities; laboratory facilities and buildings for the conduct of research and development; libraries and study facilities; continuing education conference centers; administrative and office facilities, including computers and data processing equipment; museums; necessary and related utilities; dormitories and other suitable living quarters or accommodations; dining halls, kitchens, and other food service and preparation facilities; student union buildings for student services and activity facilities and bookstores; physical education, athletic facilities, fieldhouses, stadiums, and gymnasiums; theaters, auditoriums, parking lots, and parking structures; storage and maintenance facilities; and infirmaries, hospitals, and medical and health facilities. . . .

(4) To equip, furnish, maintain and operate such projects and buildings. For the use and availability of the foregoing, the board may impose and collect rents, fees, and charges from students, faculty members, and other persons, firms, and corporations, both public and private. As used in this chapter, "projects" and "buildings" include any one or more of such facilities.

53-38-6. Disposition and use of income derived from operation of buildings--Payment of principal and interest of bonds. That except as to revenues paid directly to a trustee under the provisions of subsection (6) of section 53-38-3 hereof, all income and revenues derived from the operation of the building shall be deposited as collected in a fund in a bank or trust company approved as a regular depository by the state depository board, to be applied solely to the payment of the principal of and interest on the bonds, and, to the extent so provided in the resolution authorizing the bonds, to the payment of the cost of maintaining and operating the building and the establishment of reserves for such purposes. As principal and interest become due from time to time, the treasurer of the board, or such other fiscal officer of the institution as may be designated by resolution of the board, shall, not less than fifteen days prior to the payment date, transmit to the paying agent for the bonds, money from said fund in an amount sufficient to pay the principal or interest so falling due. Said funds and the money therein is irrevocably pledged to such purposes.

53-48-16. Property of institutions to vest in board. The board shall succeed to and be vested with all the powers and authority relating to all properties, real and personal, tangible and intangible and to the control and management thereof which was held by the governing board of each institution prior to the effective date of this act.

53-48-17. Buildings and facilities--Board to approve all construction and purchases. The board shall approve or disapprove all new constsruction, repair and rehabilitation or purchase of educational and general buildings and facilities financed from any source at all institutions subject to the jurisdiction of the board. No institution shall submit plans or specifications to the state building board for the construction or alteration of buildings, structures or racilities or for the purchases of equipment of fixtures therefor without the authorization and approval of the board.

R. Prac. Dist. & Cir. Courts

Rule 2.9 Written Orders, Judgments, and Decrees

> (a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.
>
> (b) Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within five (5) days after service.

State Court Jurisdiction Over a Federal Civil Rights Claim

This action was filed jointly under the state declaratory judgment statute and the federal civil rights statute, 42 U.S.C. § 1983 (Supp. V 1981). Neither the respondents nor the trial court challenged jurisdiction. State courts may accept jurisdiction of a claim under § 1983, but the United States Supreme Court has reserved the question whether states are obligated to do so. Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980).

Section 1983 provides:

> § 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this

> section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Several states have accepted jurisdiction of suits under this section. The propriety of their doing so was noted in Martinez v. California, 444 U.S. 277, 283 n.7 (1980):

> We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where "'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.'" Testa v. Katt, 330 U.S. 386, 391, quoting Claflin v. Houseman, 93 U.S. 130, 137. See also Aldinger v. Howard, 427 U.S. 1, 36, n.17 (BRENNAN, J., dissenting); Grubb v. Public Utilities Comm'n, 281 U.S. 470, 476. We have never considered, however, the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. Testa v. Katt, supra, at 394. But see Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969).

As this citation makes clear, state and federal courts have concurrent jurisdiction to enforce the federal and respective state constitutions. See Young v. Board of Educ., 416 F. Supp. 1139 (D. Colo. 1976), and Brown v. Pitchess, 531 P.2d 772 (Cal. 1975), for ample citations and reasoning for allowing § 1983 actions in state courts.

State district courts have jurisdiction over all civil matters unless specifically excepted by statute. Utah Const. art. VIII, § 7; Ford Canal Co. v. Cox, 92 Utah 148, 59 P.2d 935

(1936). This would logically include federal causes of action. Section 1983 does not create new rights, it is a procedural mechanism for protecting existing rights. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979). State law provides the rule of decision in § 1983 cases unless it is inconsistent with the federal constitution. Board of Regents v. Tomanio, 446 U.S. 478 (1980); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981). It would seem logical and more efficient for a state court to resolve important questions of state law, such as are presented in this case, instead of forcing a plaintiff into federal court.